Appeal No. UKEAT/0249/18/DA
UKEAT/0013/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 17, 18 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

NORTHUMBERLAND TYNE & WEAR NHS FOUNDATION TRUST APPELLANT

MISS D WARD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Dr E Morgan (of Counsel) Instructed by: Capsticks Solicitors LLP Toronto Street Leeds LS1 2HJ
For the Respondent	Mr Y Bakhsh (Lay Representative)

SUMMARY

DISABILITY DISCRIMINATION

REASONABLE ADJUSTMENTS

JUSTIFICATION

LOSS/MITIGATION

The Claimant suffers from ME/chronic fatigue syndrome ("CFS"). This makes it more likely that she will have higher absences than other employees. In 2011, the Respondent made an adjustment to its sickness absence management policy ("SAMP") whereby the Claimant could have up to 5 absences in a 12-month period before triggering the policy instead of the standard 3 absences. That adjustment seemed to operate successfully for a period of almost 4 years. However, the adjustment was abruptly removed in 2015. Whilst the Respondent made other adjustments, such as a reduction in working hours, the Claimant was unable to meet the attendance requirements under the SAMP and was subjected to the various stages of the absence management process leading eventually to her dismissal. Her complaints of discrimination because of something arising in consequence of her disability and for failure to make reasonable adjustments (under ss.15 and 20 of the **Equality Act 2010** ("the 2010 Act") respectively) were upheld by the Employment Tribunal ("the Tribunal") as was her claim of unfair dismissal, albeit that it was held that there was a 50% chance that she would have been dismissed within 4 months in any event. The Respondent appealed on the grounds that: (a) the decision on the s.20 claim was inadequately reasoned, (b) the Tribunal erred in its approach to justification; (c) the decision on unfair dismissal, which was based on the findings on justification, was similarly flawed; and (d) the decision on the **Polkey** reduction was inadequately reasoned. As to the Tribunal's subsequent judgment on Remedy, the Respondent appealed on the ground that the Tribunal erred in its analysis of causation.

Held: Dismissing the Liability Appeal, that: (a) the Tribunal had not erred in its approach to the claim for reasonable adjustments and gave adequate reasons for its decision; (b) the Tribunal was entitled to deal with justification in the way that it did, particularly given that this was a case where an adjustment that had worked well for years was abruptly removed without cause; (c) as there had been no error in the justification decision, the challenge to the unfair dismissal claim fell away ; and (d) the **Polkey** decision was adequately reasoned.

The Remedy Appeal was also dismissed as there was no inconsistency between the finding that the Claimant would be able to return to some form of work within 12 months and the award of 2 years 9 months' future loss of earnings.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. I shall refer to the parties as the Claimant and the Respondent as they were below. The Claimant suffers from ME/chronic fatigue syndrome ("CFS"). This makes it more likely that she will have higher absences than other employees. In 2011, the Respondent made an adjustment to its sickness absence management policy ("SAMP") whereby the Claimant could have up to 5 absences in a 12-month period before triggering the policy, instead of the standard 3 absences. That adjustment seemed to operate successfully for a period of almost 4 years. However, the adjustment was abruptly removed in 2015. Whilst the Respondent made other adjustments, such as a reduction in working hours, the Claimant was unable to meet the attendance requirements under the SAMP, and was subjected to the various stages of the absence management process leading eventually to her dismissal. Her complaints of discrimination because of something arising in consequence of her disability and for failure to make reasonable adjustments (under ss.15 and 20 of the **Equality Act 2010** ("the 2010 Act") respectively) were upheld by the Employment Tribunal ("the Tribunal") as was her claim of unfair dismissal. The Respondent appeals against those findings in the judgment on liability ("the Liability Judgment") and against the Tribunal's subsequent judgment on remedy ("the Remedy Judgment").

2. This appeal concerns the unusual situation in which the claim for failure to make reasonable adjustments arises out of the failure to continue an adjustment that had already been in place for a number of years. The problem for the Claimant was exacerbated by the Respondent's refusal to acknowledge that the previous adjustment had in fact been made.

Background

3. The Claimant was employed by the Respondent as an occupational therapist ("OT") from February 2000 until her dismissal on 10 May 2017. In 2009, the Claimant was diagnosed with ME/chronic fatigue syndrome ("CFS"). This was conceded by the Respondent to be a disability at all material times. This disability, as the Tribunal found, meant that the Claimant was likely to suffer from more episodes of sickness absence than other employees.

4. The SAMP operated by the Respondent, in force in at least two versions during Claimant's employment, included what have been described as "trigger points" that would result in the application of the various stages of sickness absence monitoring. The trigger point under the SAMP included, at all material times, "*3 periods of absence within a 12-month rolling period (this includes both long-term and short-term)*". I refer to this trigger as "**the standard trigger**". If 3 periods of absence were recorded within a 12-month period, the employee would enter stage 1 of a four-stage process. Warnings could be given at each stage of the process with dismissal being the ultimate potential outcome.

5. On 10 May 2011, the Claimant was issued with a first written warning at stage 1 of the process at an absence review meeting. This was because the Claimant had been absent for 3 periods (totalling 8 days of absence) between February and May of that year, thereby crossing the standard trigger. The Respondent had by then obtained an Occupational Health ("OH") report which stated that the Claimant was "*fit for work with no adjustments*" but that she was "*likely to have a higher than average sickness absence rate*". The then clinical manager, Mr Steve Hopkins, wrote to the Claimant on the same day to confirm that the warning had been given. This letter was considered by the Tribunal to be of "*great importance*" to the case. Having set out the reasons for the warning given, Mr Hopkins said as follows:

> **"After a short adjournment I informed you that I would be issuing you with a first written warning as stated earlier. I also informed you that the new target for your sickness absence will be no more than 5 episodes of sickness absence in next 12 months."**

6. The standard trigger was therefore extended by the Respondent for the Claimant to take account of the likelihood of her higher than average sickness absence rate. I shall refer to this as "**the extended trigger**". The extended trigger was considered by the Tribunal to be an example of a reasonable adjustment:

> **"4.3 … It is clear from this letter that Mr Hopkins did not disregard the Claimant's absences in giving the warning but did have regard to the Claimants higher than average sickness absence rates by adjusting the then policy trigger of 3 episodes to no more than 5 episodes. That was in our view an example of a reasonable adjustment."**

7. It was not contended by the Respondent at any stage that the extended trigger was not a reasonable adjustment at that stage; indeed, it is difficult to see how that could have been argued given that the Respondent had offered and implemented that adjustment itself having had regard to the Claimant's absences and the information from OH.

8. Between 10 May 2011 and 9 April 2015, a period of almost 4 years, there was no record of any stage 1 sickness absence review meetings. Thus, as the Tribunal found, the extended trigger was not engaged at any point in that four-year period.

9. On 10 April 2015, Ms Terry Dunsford, Clinical Lead OT, wrote to the Claimant having conducted a stage 1 sickness review meeting. A new revised SAMP had been approved by the Respondent as from February 2015. This included the standard trigger, but also provided that stage 1 would be triggered after a total of 8 days or more absence within a 12-month period. Ms Dunsford told the Claimant that the standard trigger would be applied to her. The Tribunal found that although the Claimant was not expressly told at this meeting that the extended

trigger was being removed, that was the effect of giving the Claimant a stage I warning on 10 April 2015. The extended trigger was not applied at any point thereafter. In fact, the Respondent adopted the surprising position that there had never been an extended trigger applicable to the Claimant. Despite there being email exchanges between various individuals within the Respondent which clearly showed, according to the Tribunal, that there was an awareness of the extended trigger, the Respondent maintained the position that there was no such extended trigger throughout the remainder of the Claimant's employment and in its pleaded case before the Tribunal.

10. In April 2015, the Respondent had the benefit a further report from OH. This stated, amongst other things, that, "*It is reasonable to expect Tess to have a higher absence due to conditions to that of somebody who does not suffer them*." In June 2015, there was, as I mentioned above, an email exchange suggesting that the Respondent was aware of an extended trigger being applied to her. On 8 June 2015, Ms Kelly of OH in an email to Ms Dunsford stated, "*As you know the increased triggers can no longer apply as she should have been told or about to be told at the meeting that these no longer apply*".

11. Another manager during a further internal exchange on 25 June 2015 stated:

> **"Case law passed last year confirmed that we are not automatically required to increased triggers for absence so if this is what Tess is referring to she will need to be informed that this has changed. Not saying we could not have it in place as a reasonable adjustment going forward but would be a good time to review this with her now".**

12. It does not appear therefore, that the Respondent expressly considered that the extended trigger was no longer a reasonable adjustment to make, but simply that its view of the case law meant that such an adjustment longer necessary. The case law referred to was assumed by the Tribunal to be the EAT's judgment in **Griffiths v Secretary of State for Work and Pensions** [2014] Eq.L.R. 545. That judgment was overturned by the Court of Appeal in part on 10

December 2015, but the Respondent does not appear to have changed its position as to what case law, in its view, required.

13. The removal of the extended trigger had, as the Tribunal found, an adverse effect on the Claimant in terms of her ability to comply with the attendance requirements of the SAMP and on her levels of stress and anxiety caused by her inability to comply.

14. The stage 2 attendance meeting took place on 23 July 2015. This meeting was chaired by Ms Chloe Mann. The Tribunal found that Ms Mann informed the Claimant at that meeting that the extended trigger was being removed. In the light of a recent OH report, other adjustments were put in place for the Claimant. These were as follows:

a. reducing her hours of work to 30 hours over a four-day period;
b. flexible working hours including working from home;
c. regular supervision to ensure adequate support is in place; and
d. management supervision on a bi-monthly basis.

15. The Claimant was, however, required to maintain 100% attendance during a two-month monitoring period, after which there would be a stage 3 review. The Claimant was informed that if her attendance improved she would be monitored at stage 3 for a period of 18 months during which the standard trigger would apply. If there was no improvement in attendance, the process would move to the final stage.

16. The difference between the Claimant and the Respondent as to which adjustments were reasonable and ought to have been made is made clear by the following paragraphs in the Tribunal's judgment:

> **"4.13 The Claimant relies upon the actions of the Respondent in instituting stage 2 of the policy in April 2015 as constituting a detriment in respect of the non-continuation of the extended trigger. The Claimant relies upon the actions of the Respondent at the meeting on 23 July as being an act of discrimination arising from something to do with her disability by the removal of a reasonable adjustment; and the additional detriment of progression with the SAMP policy towards to (sic) conclusion which could include dismissal. She also relies upon it as a failure to make a reasonable adjustment under the new policy.**
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> **The Respondent however relies upon the adjustments notified at that meeting as constituting all of the adjustments which it would have been reasonable to have made."**

17. The Claimant could not meet the 100% attendance target. At a stage 3 attendance meeting on 24 September 2015, the adjustments put in place earlier were continued. The Claimant was also required, once again, to comply with a 100% attendance requirement in the next 2 months at the end of which there would be a final stage review attendance meeting. A stage 4 attendance meeting took place on 24 November 2015. Whilst the Claimant had managed to avoid being absent since the previous meeting, she had further absences in December 2015 and February 2016. Throughout this period the Respondent continued to apply the standard trigger to the Claimant.

18. A further OH report produced on 18 February 2016 stated as follows:

> **"In relation to the most recent absences please do take into account that although her underlying health condition is unlikely to cause a chest infection or road traffic accident [these being the reasons for the most recent episodes of absence], her underlying health condition may mean that she will take slightly longer than expected to recover, compared to an individual who does not have this underlying health condition. Some employers are also able to take into account any absences that may be related to underlying health condition to be considered as a long-term chronic condition."**

19. By this stage, it should be noted, the Claimant had returned to working full-time hours. Further stage 4 meetings were held on 1 April 2016 and 13 June 2016. On 15 June 2016, the Claimant suffered an episode of depression which led to an absence of 73 days. A further OH report was prepared in about June 2016. This referred to the fact that the Claimant's depression

is being exacerbated by anxiety and "*relates to the pressure of the attendance policy and worrying about losing her job*". It was once again stated that the Claimant would "*have more absence than another person*" without her long-term medical conditions. She was certified as not fit to work at that time and a further adjustment of reducing her caseload to 80% was suggested.

20. A further stage 4 meeting was held on 5 December 2016. The adjustments of a reduced caseload and working hours were made. However, the Claimant was still subject to the standard trigger. The Claimant had several periods of absence in the period between January and April 2017.

21. A final stage 4 attendance meeting was held on 10 May 2017, at which the Claimant was dismissed. The Claimant's appeal against dismissal was rejected by Ms Suzanne Miller, the then Services Manager. The Claimant had referred to the extended trigger at each stage of the absence reviews. However, Ms Miller stated that she was:

> **"…unable to find evidence that Tess was previously provided with extended triggers for her absence five in 12 months and on review of her absences over the past two years Tess has hit five or more triggers in each 12 month period. Therefore, if the five triggers in 12 months had been in place this would not have prevented Tess from continuing through the sickness policy."**

22. The Tribunal found that the first part of that passage was "*not entirely truthful*" given the email exchanges about the extended trigger.

<u>The Tribunal Proceedings</u>

23. The Claimant issued proceedings in the Tribunal. She made claims under ss.15 and 20 of **the 2010 Act** on the basis that she had been subject to unfavourable treatment because of

A something arising in consequence of her disability and due to the failure to make reasonable adjustments. She also claimed that her dismissal was unfair and in breach of contract. Apart from the breach of contract claim, all of the claims were upheld at a hearing before Employment Judge Hargrove and Members in March 2018.

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24. Part 7 of the Liability Judgment sets out the Tribunal's conclusions. The first part of the conclusions deals with the claims under ss.15 and 20 of **the 2010 Act**. The Tribunal begins, however, with the letter of 10 May 2011, in which Mr Hopkins had confirmed the extended trigger. The Tribunal noted that the letter had not been disclosed to the Claimant during the normal disclosure process. It had in fact only emerged as a result of a subject access request in 2017. The Tribunal considered "*the circumstances of its non-disclosure as being suspicious*", but it was not satisfied that it was deliberately suppressed as had been alleged by the Claimant's representative, Mr Bakhsh. It went on to state:

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> **"7.2 … Despite acquitting the Respondent of such serious impropriety however we are satisfied that despite knowing from the reliable source that the Claimant had had in place what amounted to an adjustment, the Respondent, in particular CM, chose to give it little credence or weight because there was apparently no documentary evidence to support it. This, spuriously in our view, was used as a part of the reasoning for not continuing with the adjustment and, indeed removing it."**

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F 25. The Tribunal then identified the provision, criterion or practice ("PCP") that was applied to the Claimant and which was said to have put her at a disadvantage:

> **"It is clear to us that the PCP which was applied to the Claimant from 2011, and continued to be applied in an even more restricted form from April 2015 was that the Claimant "must maintain a certain level of attendance at work order not to be subject to a risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal…". See the judgment of Lord Justice Elias in Griffiths at paragraph 47. See also the following passage at paragraph 58:**
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> **"Therefore the whole purpose of the section 20 duty is to require the employer to take steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove the disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant".**
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> **It is not the SAMP in general which generated the disadvantage to the Claimant but the application of the targets under the various versions of the SAMP to the Claimant's various sickness absences. That also involves consideration of the next issue which is**

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> **whether the application of the targets put her at a disadvantage because of a disability or because of something arising from her disability, under section 15 of the Act…"**

26. The Tribunal then considered the various OH reports to which the Respondent had had access, including the report of 15 June 2015 which expressly stated that, "*It may be a reasonable adjustment to expect her to have more absence than another person without these conditions*".

27. The Tribunal went on to consider the extent to which the Claimant's various absences in the period after June 2015 were related to a disability. Having once again considered the contents of various OH reports, the Tribunal concluded as follows:

> **"7.4 In summary, we conclude that at least most of the absences were disability-related, either directly, or, indirectly because of CFS the Claimant had greater susceptibility to other illnesses or sicknesses, and the absences were likely to be longer. The sicknesses were likely to increase her tiredness which was itself a side-effect of the CFS. There is no medical evidence directly linking the claimant's depression to CFS or the respondent's treatment of her, nor is there evidence linking the claimant's increased anxiety and stress, which may itself be linked to the depression, to the imposition of the stricter absence targets. …What is clear is that the Respondent was told that her underlying condition was likely to lead to increased sickness absences from the start."**

28. The Tribunal next considered whether the adjustment which the Claimant was seeking was one which would have been reasonable for the Respondent to have made or continued. After referring to passages in **Griffiths** (CA), the Tribunal held as follows:

> **"7.6 We conclude that there was ample evidence that the continuation of the existing adjustment would have "ameliorated the disadvantage resulting from the application of the policy". The first reason we reach that conclusion is because the Claimant was able to continue in employment (thus satisfying one of the objectives at which section 20 is aimed) from 2011 onwards without a break. There were episodes of sickness absences in that period but not such as to exceed the adjusted target of more than 5 in the year. More particularly, although Mr Morgan contests this, there is no evidence whatsoever that the Claimant was subjected to any warning under the policy nor is there evidence of concerns being expressed as to her work performance. Secondly, if it had been continued, perhaps alongside other adjustments which the Respondent did make, the Claimant would not have hit the relaxed target of no more than 5 absences if the absences taken into account were calculated on a year-to-year basis from 10 May, except in year commencing 10 May 2015. It is to be noted that the Claimant is not arguing for a wider adjustment of discounting all sickness absences, although she could have, on the authority of Griffiths. If the extended target adjustment had been made, we accept the fundamental point that the Claimant would not have entered the SAMP absence management process, or had warnings thereunder, at least until 2016, nor was it likely**

that the Claimant would have reached the stage where her continued employment was under threat."

29. The Tribunal was clear, therefore, that there was a causative link between the failure to apply or continue the extended trigger and the fact that the Claimant was subject to the SAMP management process that led to her employment being under threat.

30. The Tribunal concluded that the application of the SAMP to the Claimant at the restricted level (i.e. with the standard trigger) "*clearly constituted a detriment under section 39 (2) of the Equality Act with effect from April 2015, and a failure to make a reasonable adjustment*."

31. The Tribunal next considered whether the continuing failure to make the adjustment gave rise to unfavourable treatment:

"7.8 The next question we have to answer is: Did any continuing failures to make reasonable adjustments and/or any further application of the 2015 SAMP thereafter constitute acts of unfavourable treatment/detriment for the Claimant arising from something to do with her disability,… We find that each of the extended application of the policy at stages 2, 3 and 4 (the latter on three occasions), and the dismissal itself constituted further failures to make reasonable adjustments and/or acts of detriment…"

32. Having found that there was unfavourable treatment, the Tribunal went on to consider whether the Respondent's treatment of the Claimant was justified. As to this it held as follows:

"7.8…The burden lies upon the Respondent to show that the treatment in question had nothing to do with disability or to show that the treatment in question was justified as pursuing a legitimate objective under section 15(2) of the Act. That treatment includes the detriments outlined above and including the dismissal. We have already concluded that the treatment was for reasons related to the disability and did constitute a failure to make reasonable adjustments. That continued up to and including the dismissal. If the relevant adjustment had been made the Respondent would probably not, or not then (in May 2017), have reached the stage in the policy where dismissal would have occurred. In any event, it is necessary for the Respondent to show that the treatment and in particular the dismissal was justified as pursuing a legitimate objective. Treatment which may constitute a breach of section 15 may nonetheless be justified. Since the Respondent did not recognise that it was under a duty to make reasonable adjustments to the trigger points, it cannot be the case that the Respondent gave proper and adequate consideration to the balancing of the legitimate needs of the Respondent's service in particular to service users with the discriminatory effects of its decision to dismiss the Claimant. The relevant balancing exercise did not in fact take place. We

recognise however that the Respondent did have legitimate concerns for the quality of the occupational health element of the service being provided to vulnerable service users at the Molineux Centre; and that the Claimant's disability related absences did have deleterious effects upon the quality of that service since she was one of the only two occupational therapists. The Claimant's e-mails in particular from December 2016 onwards indicate that she was seriously struggling with her even reduced workload. We conclude however that the failures to make the reasonable adjustment and the repeated application of the trigger policy did have an adverse effect upon the Claimant's anxiety and stress and upon her work performance. The Respondent importantly failed to undertake the tailored adjustment plan process recommended in the last Team Prevent report. It did not consult with the Claimant properly as to whether there were further adjustments it could make at that late stage. It did not follow its own redeployment policy. For these reasons, we find that the defence of justification does not succeed. The issues raised however are also relevant to the application of the Polkey test below."

33. Accordingly, the claims under ss.15 and 20 were upheld. The Tribunal dealt with the unfair dismissal more economically as follows:

"8. Was the dismissal fair or unfair? We have accepted that the reason or principal reason for the Claimant's dismissal was a reason related to capability or some other substantial reason which might have justified dismissal but we find that the dismissal was procedurally and substantively unfair for many of the reasons which we have set out for rejecting the Respondent's justification defence, although we accept that the tests are to (sic) not precisely the same: See Judgment of Underhill LJ in O'Brien v Bolton St Catherine's Academy 2017 EWCA p.145, especially at paragraphs 53-55"

34. The Tribunal finally assessed the chance that the Claimant would have been dismissed if, absent discrimination, a fair procedure had been followed:

"9. This requires the application of the Polkey test in relation to the unfair dismissal claim; and the similar test for discrimination claims set out in Chagger v Abbey National PLC 2010 IRLR page 47 CA. See especially at paragraphs 56-60 per Elias LJ. We have already indicated that the Claimant's sickness absence record put a strain on the Respondent's ability to maintain a proper OT service to service users at Molineux in year 2015- 2016, during which the Claimant had a single absence lasting 73 days in addition to more than 5 other absences. There is the distinct possibility that the Claimant could have been justifiably and fairly dismissed; and certainly the SAMP stages would have been triggered at stage 1, even if the adjustment been in place. As of 6 December 2016 the Claimant's role had been changed to a generic OT role not doing any assessments. There is a real issue as to whether and for how long the Respondent could reasonably have continued with that adjustment. Despite the fact that she was only working for 30 hours per week and on 80% of her caseload, she continued to struggle with her health; and to request more working from home, which was not a practical solution, although she would not have been under such pressure if she had not had imposed the full rigour of the 2015 SAMP targets. I(t is highly unlikely that if the Respondent had followed the redeployment policy to the letter, any alternative OT job would have been found for the Claimant which she could have undertaken; and she would not have accepted a less qualified job of lower status. On these circumstances we find that there was a 50 % chance that she would have been dismissed within 4 months of 10 May 2017 in any event."

35. At a subsequent remedies hearing held in September 2018, the Tribunal awarded compensation. In doing so, the Tribunal noted, amongst other matters, that the Claimant had not

A been fit to apply for work in her field but had not abandoned the prospect of returning to OT work, and that she had undertaken training in mindfulness. As to her prospects of a return to fitness, the Tribunal held as follows having considered the unchallenged medical evidence of Dr Sprickett, the Claimant's consultant, who had said, "*I am hopeful that, once the current circumstances improve and after further work with therapy team, return to work after a further 6 months is a reasonable expectation…*":

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> **"8 …Mr Morgan raised an issue in his closing submissions as to how the expression "a return to work after a further six months" was to be interpreted. It is not entirely clear because Dr Spickett does not explain what he meant by "the current circumstances improve" and "after further work with the therapy team". We certainly accept that the resolution of the Tribunal proceedings is likely to lead to some improvement in her health, although we note that whilst the Employment Tribunal's proceedings are now concluded, and the Claimant will be in receipt of judgment for a not insubstantial amount of compensation, there is still an outstanding appeal with the accompanying uncertainty for the Claimant. The Respondent is of course perfectly entitled to appeal, but it will extend to an extent the uncertainty. We do not read use of the term "six months" as dating from the date of the letter of 22 May 2018. We conclude doing the best we can, that the Claimant's health will substantially improve within the next 12 months and that she will by then be fit to return to some form of work but it will never be full time work although it could well be work for a similar number of hours per week as she was working for the Respondent at the time of the dismissal. There is certainly no evidence that she will <u>not</u> recover to the state she was prior to the discrimination." (Emphasis in original)**

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E 36. For present purposes, it is only necessary to consider one further passage of the Remedy Judgment relating to future loss of earnings:

> **"10. Future loss of earnings**
> **We conclude that the Claimant may be capable of some work in the mindfulness field in the Spring of 2019. It is to be noted that the Claimant has provided no indication of how much she expects to earn if she started running mindfulness courses but we consider it highly unlikely that she would be able to earn anything like the same amount as she was earning latterly with the Respondent or even at the 50% continuing loss rate of £11,732. We next considered the Claimant's prospects of returning to her chosen career of occupational therapy. We do not accept that the evidence contained in the added appendices of vacancies available for occupational therapists in the North East demonstrates that she will find it easy to find alternative employment in that field. Many of the local vacancies were vacancies with the Respondent Trust, the sole Trust providing occupational therapy services in the Tyneside area. Others were from 20 to 40 miles away from where she lived and used to work. It is to be noted that the Claimant worked within some three miles or so of her home when she worked for the Respondent. There was medical evidence that travelling was and remained a particular source of fatigue for the Claimant. It is not reasonable for the Claimant to be expected to travel more than a few miles to work. Furthermore, it is clear that because of her disability she is unlikely to be able to work full time; and probably not more than 30 hours per week. There are likely to be fewer jobs available for part time occupational therapists; and we cannot ignore the fact that she is likely to require other adjustments and to have significant periods of time off work if she has relapses which will not make her an attractive prospect to a prospective employer. Furthermore, as stated above almost all of the local occupational therapy jobs are with the Respondent. We accept however that there will be occupational therapy vacancies with non-NHS employers including local**

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> **authorities. The essential issue is when ought the Claimant reasonably to be able to obtain employment at a rate of pay equivalent to £11,732 per annum. We firmly reject the Claimant's contention that she is entitled to compensation from now until a prospective retirement age of 67. There are a series of discounting factors:- amongst them the prospect of a deterioration in her health not attributable to the Respondent; the possibility, remote at the moment, that she may make a full recovery from CFS; the possibility that she would have given up work anyway long before retirement age and the loss of any new job for a number of other reasons; or for example her choice to engage in mindfulness as a career choice at a substantially lower rate of pay at which stage she would be failing to mitigate her loss. In these circumstances we consider it just and equitable to award a further two years' loss of earnings in addition to the remaining nine month period of recovery from the aggravation attributable to the Respondent. We calculate the Claimant's future loss at 2.9 years x £11,732, totalling £32.263. We do not take into account the probability of pay rises in that period because the pay rises will be more than offset by the accelerated payment of the award, which could be invested."**

Legal Framework

37. Section 15 of **the 2010 Act** deals with discrimination arising from disability. So far as relevant, it provides:

> **"(1) A person A discriminates against a disabled person B if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim".**

38. Section 20 of **the 2010 Act** deals with the duty to make adjustments. So far as relevant, it provides:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A. (2) The duty comprises the following three requirements. (3) The first requirement is a requirement, where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage …".**

The Appeals

39. The Respondent appeals against both the Liability and Remedy Judgments. I deal first with the appeal against the Liability Judgment ("the Liability Appeal").

A. Liability Appeal

Grounds of Appeal

40. The permitted grounds of appeal against the Liability Judgment may be summarised as follows:

a. The Tribunal's decision on the s.20 claim was inadequately reasoned, particularly in relation to the specific PCP in question, the disadvantage that it caused and the specific adjustments contended for by the Claimant;

b. The Tribunal erred in its assessment of the Respondent's justification defence under the s.15 claim. The Tribunal failed to decide the question of justification objectively. Instead, it focused on the Respondent's inability to explain the removal of the extended trigger, and, in doing so, considered other adjustments that were not part of the Claimant's case;

c. The Tribunal's conclusion on unfair dismissal was based on its findings on justification. If the latter are erroneous, then so too must be its consequential decision on unfair dismissal;

d. The decision as to the **Polkey** reduction was inadequately reasoned.

41. I shall deal with each of these grounds of appeal in turn.

Ground 1 – Was the Tribunal's decision on the s.20 claim inadequately reasoned?

Submissions

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42. The scope of this ground was clarified at a Rule 3(10) Hearing before HHJ Eady QC (as she then was) as amounting to a challenge as to the adequacy of the reasons, and in particular that the Respondent was arguably left unable to understand exactly what adjustments would have been reasonable. Dr Morgan, who appears for the Respondent as he did below, relied on some preliminary matters as laying the groundwork for his submission as to the inadequacy of reasons. He submits that the error in the Tribunal's approach arises from its failure to acknowledge that the sole adjustment contended for by the Claimant related to the removal of the extended trigger. Instead, the Tribunal considered "*further adjustments*" that were not in fact part of the Claimant's case. Particular reliance is placed upon the following paragraph in the Tribunal's decision at paragraph 7.6:

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> **"We find that each of the extended application of the policy at stages 2, 3 and 4 (the latter on 3 occasions), and the dismissal itself constituted further failures to make reasonable adjustments and/or acts of detriment."**

43. It is said that this paragraph betrays a "mindset" on the part of the Tribunal that the SAMP should not have been applied to the Claimant at all. If the Tribunal had, instead, focused on the adjustment contended for by the Claimant, it would have concluded that that adjustment was neither effective not sufficient to enable the Claimant to perform her duties. It was self-evident from the various measures that had been put in place from mid-2015 that they had been ineffective in facilitating the Claimant's attendance at work. The error is compounded, says Dr Morgan, by the decision on the **Polkey** ground which appears to support the Respondent's contention that there was no reasonable adjustment that could be made to keep the Claimant at work. Having regard to these matters, the Tribunal's decision is, says Dr Morgan, inadequately reasoned.

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44. Mr Bakhsh, who appears for the Claimant as he also did below, submits that the fundamental flaw in the Respondent's appeal is its failure to recognise that the adjustment to

A the SAMP in the form of the extended trigger had operated successfully for almost 4 years before its removal. Furthermore, the Tribunal expressly found that the removal of the extended trigger and the failure to adopt it thereafter amounted to a failure to make reasonable adjustments and that there was "*ample evidence that the continuation of the existing adjustment would have ameliorated the disadvantage resulting from the application of the policy*". In the light of such findings, submits Mr Bakhsh, it is obvious why the Respondent lost and there is no deficiency in reasoning.

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Discussion

D 45. The duty to make reasonable adjustments under s.20 of **the 2010 Act** has been described as one requiring "*affirmative action in certain situations*": see **Griffiths** (CA) at [17]. The first stage in a s.20 claim is to identify the PCP which is said to be putting the employee at a disadvantage. In the **Griffiths** case itself, the PCP that was putting the employee at a

E disadvantage was "*that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal*.": see **Griffiths** at [47]. The Tribunal

F considered that that was also the PCP in the present case: see paragraph 7.2. The Tribunal went on to say in the same paragraph that, "*It is not the SAMP in general which generated disadvantage to the Claimant but the application of the targets under the various versions of*

G *the SAMP to the Claimant's various sickness absences*."

46. It was quite clear, on the evidence before the Tribunal, that that PCP did put the Claimant at a disadvantage because she was likely, as a result of her condition, to have higher

H levels of absence than other employees. The duty to make reasonable adjustments to avoid that disadvantage was therefore engaged. There is no obligation on an employee to identify what

A those reasonable adjustments should be at the time, although "*there must be some indication as to what adjustments it is alleged should have been made*" by the time the case is heard before a Tribunal: see **Project Management Institute v Latif** [2007] IRLR at [53]. Dr Morgan contends that the Claimant in the present case had only identified the extended trigger as the particular adjustment which it is said would have avoided the disadvantage, and that the Tribunal had wrongly considered other adjustments as being reasonable without giving the Respondent a fair opportunity to contest them.

47. I reject that submission. The Tribunal is quite clear throughout its judgment that the extended trigger was the adjustment that would have ameliorated the particular disadvantage caused by the PCP of having to maintain a certain level of attendance. The Tribunal said so in terms at paragraph 7.4: "*We conclude that there was ample evidence that the continuation of the existing adjustment would have "ameliorated the disadvantage resulting from the application of the policy"*". When read with the rest of paragraph 7.4 it is clear that the reference to the "*existing adjustment*" can only be to the extended trigger, which was the only adjustment in place prior to June 2015. That adjustment was clearly requested by the Claimant from the moment it was removed in 2015 right up to and including her claim before the Tribunal. The circumstances which existed in the **Latif** case, whereby the employee sought to rely at the hearing upon an adjustment that had not previously been identified, do not arise here.

48. The particular passage upon which Dr Morgan relies as belying the Tribunal's consideration of other adjustments does not, when read in context, indicate that the Tribunal had different adjustments in mind. For convenience, I set out the relevant passage again:

> **"We find that each of the extended application of the policy at stages 2, 3 and 4 (the latter on 3 occasions), and the dismissal itself constituted further failures to make reasonable adjustments and/or acts of detriment." (Emphasis added)**

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49. Dr Morgan says that the use of the plural "*adjustments*" suggests that the Tribunal had something more than the extended trigger in mind, particularly as they had previously referred to the "*adjustment*" in the singular. He also contends that the Tribunal erred in referring to the "failure to adjust the trigger" (as opposed to its removal) as that was not part of the Claimant's case. I cannot accept that use of the plural here indicates anything other than a reference to the repeated failures in respect of the same adjustment. The immediately preceding paragraphs make that clear:

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> **"7.7 … In the circumstances we find that the removal of the extended trigger and that the failure to adjust the triggers in the 2013 policy constitute acts of discrimination contrary to section 15 and failures to make reasonable adjustments under section 20 of the act.**
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> **7.8 the next question we have to answer is: did any continuing failure to make reasonable adjustments and/or any further application of the 2015 SAMP thereafter constitute acts of unfavourable treatment/detriment for the Claimant arising from something to do with her disability…?"**

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50. In my judgment, although the Tribunal refers to the "*extended trigger and the failure to adjust the triggers*" (my emphasis), it is referring to the same thing, that is to say the removal of the extended trigger and the failure to reinstate it thereafter. There is nothing to suggest that the Tribunal had in mind any adjustment other than the extended trigger when referring to 'adjusting the triggers'. It follows, therefore, that, contrary to what Dr Morgan says, the Tribunal did focus on the adjustment contended for by the Claimant. The failure to make that adjustment over time had the various consequences for the Claimant, in terms of not being able to comply with the SAMP and on her health, to which the Tribunal refers.

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51. Dr Morgan submits that even if it might have been reasonable to have applied an extended trigger between 2011 and 2015, that did not necessarily mean that that adjustment remained reasonable thereafter, and that the Tribunal's fixed approach to that adjustment meant that it failed to consider whether the other adjustments that were made were in fact reasonable. I

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have no difficulty with the proposition that an adjustment that is considered reasonable at a particular point in time is not automatically to be treated as being reasonable indefinitely thereafter, although if the employer seeks to contend that an adjustment is no longer reasonable, it would be expected to be able to demonstrate some change in circumstances. The difficulty I have with Dr Morgan's submission is that there was no evidence before the Tribunal to suggest that that which had worked well for almost four years would not have continued to do so.

52. It is of course correct to note that there may be more than one reasonable adjustment capable of ameliorating the disadvantage in question. To take a simple example, a disabled employee who suffers pain as a result of his computer monitor being at a particular height relative to his chair might benefit from an adjustment to the monitor or to his chair. If one of those adjustments is sufficient and effective to ameliorate the disadvantage, and is made, the employer would not be acting unreasonably if it did not also adopt the other. However, the employer might not be acting reasonably if it chose to make other adjustments instead, such as improving the lighting or reducing the number of hours spent at the computer, if those adjustments did not in fact have the effect of avoiding the particular disadvantage in question. In the present case, the Tribunal came to the conclusion that the most effective reasonable adjustment to enable her to remain at work, namely the extended trigger, was not made, and that the other adjustments "*were either not adjustments which ameliorated the disadvantage or only to a limited extent*": see paragraph 7.7. That was a conclusion that the Tribunal was entitled to reach, and to my mind, it discloses no discernible error of law at all.

53. I deal briefly with two further authorities cited by Dr Morgan in the course of his submissions on this ground. The first is **County Durham and Darlington NHS Foundation Trust v Dr Jackson and Health Education England** UK EA/068/17/DA. In that case HHJ Shanks held, amongst other things, that it is for the disabled person to identify the PCP of the

A Respondent on which he relies to demonstrate the substantial disadvantage to which he was put and that it is for the disabled person to identify, at least in broad terms, the nature of the adjustment that would have avoided the disadvantage. In my judgment, that decision does not assist the Respondent, as both the PCP and the adjustment relied upon were clearly identified by the Claimant in the present case.

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54. Dr Morgan then referred to the decision of the EAT (Cox J presiding) in **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744. In that case, there had been on the employer's part a "*spectacular failure to consult*" the disabled employee in relation to the reasonable adjustments that might alleviate the disadvantage in question. Cox J held:

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> **"55. The only question in such cases is therefore whether, objectively, the employer has complied with his obligations or not. If he has, it matters not, so far as law is concerned, that he failed to consult the employee at the time. If he is not, it reveals nothing that he had consulted employee about any adjustments that might be made."**

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55. Dr Morgan submits that that case demonstrates that in assessing reasonable adjustments, the Respondent's failure to acknowledge the previous adjustment of the extended trigger should not have been held against it in the way that it was by the Tribunal in this case, and that the Tribunal should simply have focused on whether, objectively, the Respondent had complied with its obligations. That case does not assist the Respondent for the simple reason that the Tribunal did expressly conclude that the Respondent did not make this "*most effective reasonable adjustment*" from mid-2015 onwards. The fact that the adjustment had been in place for the previous 4 years supports the objective conclusion that this was a reasonable adjustment to have made. There is nothing in the Tribunal's judgment to suggest that the Respondent's failure to acknowledge that fact in itself rendered the failure to make the adjustment unreasonable.

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56. The permitted focus of this ground of appeal was inadequacy of reasoning, although, as can be seen from the above, the scope of the ground was expanded somewhat from that narrow basis. For the reasons set out above, it is my judgment that the Tribunal's reasons are adequate to explain why the Respondent's case as to reasonable adjustments was not accepted. This ground of appeal is not upheld.

Ground 2 – Did the Tribunal err in its approach to justification under the s.15 claim.

Submissions

57. Dr Morgan's submissions on this ground overlap to some extent with those made on the s.20 claim. That is not surprising given that the Tribunal's judgment deals with the s.15 and s.20 claims together. Thus, it is said that the Tribunal wrongly referred to "*further adjustments*" when in fact only one, namely the extended trigger, was being relied upon, and that there was an incorrect perception on the Tribunal's part that the Claimant's case was that the SAMP should not have been applied to her at all. Dr Morgan further submits that that misperception as to the true nature of the Claimant's case contaminated its consideration of the justification defence. In considering justification, the Tribunal did not engage at all with the rationale for the SAMP or the evidence adduced by the Respondent as to the operational needs which it served. Instead, submits Dr Morgan, the Tribunal appeared to take the approach that the Respondent's failure to recognise that it had previously adjusted the policy for the Claimant effectively excluded any justification defence at this stage.

58. Mr Buksh submits that the Respondent's treatment was not justified as the Tribunal clearly found. The effect of the Respondent's submission, contends Mr Bakhsh, is a return to the position as it was before the introduction of s.15 of **the 2010 Act**, whereby unfavourable

A treatment of a disabled person would not give rise to unlawful discrimination if non-disabled persons were treated in the same manner.

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Discussion

59. Although the Liability Judgment might have been better structured to deal separately with the ss.15 and 20 claims, it was not necessarily wrong for the Tribunal to have treated them as closely allied. Claims under ss.15 and 20 of **the 2010 Act** are often related. As stated by Elias LJ in the **Griffiths** case:

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> **"…[I]t is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms [of discrimination]. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified.…"**

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60. In the present case, the Tribunal expressly found that the unfavourable treatment meted out to the Claimant included the dismissal itself: see paragraph 7.8. They also concluded that that treatment was for reasons related to the disability. Closely allied to that finding was its conclusion that if the relevant adjustment had been made, the Claimant would probably not have reached the stage in the policy where dismissal would have occurred. It was open to the Tribunal to conclude that the dismissal, which was clearly unfavourable treatment, was because of something arising in consequence of her disability within the meaning of s.15 of **the 2010 Act**, and which fell to be justified.

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61. For the reasons already set out in relation to the first ground of appeal, I reject Dr Morgan's submission that the Tribunal somehow erred in its approach to the PCP and/or to the

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identification of the relevant reasonable adjustment. I was not taken to anything in the Liability Judgment that would suggest that the Tribunal had at any stage considered that the Claimant's case was that the SAMP should not have been applied to her at all. The Tribunal states in terms, *"It is not the SAMP in general generated the disadvantage to the Claimant but the application of the targets under the various versions of the SAMP to the Claimant's various sickness absences*": see paragraph 7.2. The Tribunal focused throughout on the adjustment of the extended trigger and not to any broader adjustment such as the non-application of the SAMP to the Claimant at all. Dr Morgan's further argument that the Tribunal's analysis of justification was contaminated by a misperception as to the case being put does not, therefore, get off the ground.

62. I turn therefore to the question of justification as considered by the Tribunal. Dr Morgan highlights the fact that at paragraph 7.8 of the Liability Judgment, the Tribunal, having correctly recognised that there was a need to balance the legitimate needs of the Respondent's service against the discriminatory effect of its treatment of the Claimant, stated that, "*The relevant balancing exercise did not in fact take place*". Dr Morgan says that this sentence conclusively demonstrates that the Tribunal: (a) did not consider the question of justification objectively, as it was required to do; and (b) appeared to consider that the Respondent was precluded from relying upon justification at all because of its failure to consider justification at the time. He referred me to the case of **Trustees of Swansea University Pension & Assurance Scheme v Williams** [2015] IRLR 885. There the employment tribunal was criticised for not considering justification objectively, and instead relying on the employer's failure to consider the potentially discriminatory effect of a pension scheme rule at the time. Langstaff J (the then President) held as follows:

> **"This approach … did not have regard to the principle that when considering justification, the Tribunal is concerned with that which can be established objectively. It**

therefore does not matter whether the alleged discriminatory thought that what it was doing was justified. It is not a matter for it to judge, but for the courts and Tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it was achieved. For just the same reasons it does not ultimately matter that the decision-maker failed to consider justification at all: to decide the case on the basis that the decision-maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of the Tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by decision-maker considered discrimination at all, think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, if entirely without him. Evidence that other means had been considered and rejected, for reasons appeared good to the alleged discriminator at the time, may give confidence to the Tribunal in reaching its own decision that the measure was justified."

63. The more recent decision of the Court of Appeal in **City of York v Grosset** [2018] IRLR 746 (at [54]) is also relied upon for the proposition that the test under s.15 of **the 2010 Act** is an objective one according to which the Tribunal must make its own assessment.

64. Had the Tribunal's analysis of justification in the present case ended after the sentence, "*The relevant balancing exercise did not in fact take place*", there might have been more scope for arguing that there had been a failure to consider the matter objectively. However, it is quite apparent that the Tribunal did not stop there, and that it went on to consider expressly the various factors relevant to the balancing exercise for itself. Thus, it took account of the Respondent's legitimate concerns for the quality of the service, that the Claimant was one of only two OTs and that she was struggling latterly to cope even with her reduced workload. Against that the Tribunal considered the effect on the Claimant of the failure to make the reasonable adjustment, the Respondent's failure to undertake the tailored adjustment plan recommended by OH, its failure to apply the redeployment policy and to consult with the Claimant. Whilst not rich in detail, that analysis is, in these circumstances (where the adjustment had previously been in place), a perfectly adequate engagement with the objective analysis with which the Tribunal was tasked. As in the example given by Elias LJ in the **Griffiths** case (at [26]), it is hard to see how a dismissal could be justified if there was a

reasonable adjustment that, if made, would or might have avoided that outcome. That is all the more so, it seems to me where the adjustment is one that had already been in place for a number of years without any difficulty and where it is removed without, it would appear, any particular need for it to cease. I note in this regard the Tribunal's reference to the evidence of the email sent by Ms Lycett on 25 June 2015 in which she states, "*I'm not saying we could not have[the extended trigger] in place as a reasonable adjustment going forward but would be a good time to review this with her now*." It could not really be plainer that there was no evidence of any change in operational need that would suddenly render unreasonable, that which had hitherto been eminently reasonable. The reason that the Tribunal referred to the Respondent's failure to acknowledge the pre-existence of the extended trigger was because that was something that the Respondent had itself put forward as a reason (or part of the reason) for not continuing with the adjustment: see paragraph 7.2. There was no error in the Tribunal's approach to that evidence.

65. Dr Morgan also referred me to the decision of the Supreme Court in **Seldon v Clarkson Wright & Jakes** [2012] ICR 716 in the course of his submissions on this ground. He contends that the effect of that judgment is that it is the SAMP that must be the focus of any justification analysis and not the unfavourable treatment itself. That was a case involving claims of age discrimination brought by a partner in a law firm who was required by the firm's rules to retire at the age of 65. In relation to whether the rule was justified, Baroness Hale said:

> **"65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it…**
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> **66. There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the particular circumstances of the business…"**

66. Thus, contends Dr Morgan, it is the policy itself that needs to be justified and not the application of that policy to the Claimant. I do not accept that contention. Section 15(1)(b) of

the 2010 Act provides that there is discrimination within that provision if there is unfavourable treatment and "*A cannot show that the treatment is a proportionate means of achieving a legitimate aim*". The focus of that provision is therefore very much on the treatment being the target for justification, and not, for example, a PCP (as in the case of a claim of indirect discrimination under s.19 of **the 2010 Act**). That analysis is supported by the decision in **Griffiths**, in which Elias LJ held:

> **"27 … [I]t is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, acknowledged that the employee is disabled. Both require essentially the same proportionality analysis. Strictly, in the case of indirect discrimination it is the PCP which needs to be justified whereas in the case of discrimination arising out of disability is the treatment, but in practice the treatment will flow from the application of the PCP. Accordingly, once the relevant disparate treatment is established, both forms of discrimination are likely to stand or fall together. However, the converse is not true. If it is not possible to establish that the relevant PCP created a disparate impact, the case will not fall within the concept of indirect discrimination but it may nonetheless constitute discrimination arising out of disability." (Emphasis added)**

67. The treatment in the present case was the removal of the extended trigger, the failure to reinstate it thereafter and the dismissal that resulted. It is that treatment which falls to be justified. In any event, **Seldon** was dealing with age discrimination, which, unlike disability discrimination, does not require the employer to adopt more favourable treatment for disabled persons than non-disabled persons if that is reasonable. If it is reasonable to adjust a policy to alleviate a disadvantage for a disabled person, and the failure to make that adjustment is relied upon as unfavourable treatment under s.15, it would diminish the protection afforded by **the 2010 Act** if the employer could seek to justify its treatment by reference only to the policy in general without any reference to its specific failure to make that adjustment.

68. This ground of appeal fails and is dismissed.

Ground 3 – Did the Tribunal err in concluding that the Claimant was unfairly dismissed?

69. The permitted ground of appeal under this ground is set out as follows in the Notice of Appeal:

> **"10.4 The Tribunal's determination on this claim is (according to the Written Reasons) dependent upon the prior determination under section 15… It follows that the Tribunal relied upon and reapplied its defective findings and analysis in engaging with this aspect of the claim."**

70. This ground of appeal is therefore entirely dependent on establishing that the Tribunal's earlier conclusions under ss.15 and 20 are erroneous. As I have found that there was no error of law in respect of those conclusions, this ground of appeal falls away. I deal briefly nevertheless with some of the additional points that were made by Dr Morgan in the course of oral submissions.

71. The first is that if the Tribunal had engaged properly with the justification test under s.15 of **the 2010 Act** then it may well have taken a different view of the procedural deficiencies and would not have produced a decision on unfair dismissal that was not **Meek**-compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250, CA). As I have held above, the justification analysis was objective and adequate in the circumstances of this case, where a reasonable adjustment was removed and not reinstated without any operational need for such action being explained. In its conclusion on unfair dismissal, the Tribunal refers specifically to "*many of the reasons which we have set out rejecting the Respondents justification defence*". Those reasons referred to various failures on the part of the Respondent, including the failure to make reasonable adjustments, the failure to undertake the tailored adjustment plan, the failure to consult with the Claimant and the failure to follow its own redeployment policy. Each of these matters is dealt with in more detail in earlier sections of the Liability Judgment.

A Notwithstanding its brevity, when the section on unfair dismissal is read fairly with the rest of the Liability Judgment, the reasoning is adequate.

72. Dr Morgan also says that the reference to the judgment in **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145; [2017] ICR 737, and the acknowledgement that the test for unfair dismissal is different, are not sufficient to nullify the defects in reasoning. In **O'Brien** (which was also a disability discrimination case), there was a similarly terse conclusion in respect of the related unfair dismissal claim. In dealing with a challenge that the decision on unfair dismissal was not **Meek**-compliant, Underhill LJ said as follows:

> **"53. However the basic point being made by the Tribunal was that its finding that the dismissal of the Claimant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4) . In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the *756 nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and Tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat—what is sometimes insufficiently appreciated—that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the Tribunal under section 98(4) to one of "quasi- *Wednesbury* " review (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*): see the cases referred to in para 11 above [5] . Thus in this context I very much doubt whether the two tests should lead to different results.**

73. In my judgment, similar points may be made about the unfair dismissal decision in this case. There was a clear conclusion that the treatment of the Claimant and her dismissal were not justified, or were, in other words, disproportionate. The Tribunal relied upon "*most of the same reasons*" for that conclusion in concluding that the dismissal was also unfair. Whilst it would have been preferable for the Tribunal to have set out precisely which of those reasons was in fact relied upon, it is not a difficult task to discern those that would give rise to the conclusion

that the dismissal was substantively and procedurally unfair. A dismissal which is unjustified and disproportionate is unlikely to fall within the band of reasonable responses open to a reasonable employer (although, as noted by Underhill LJ in **O'Brien**, that will not invariably be the case: see [52] and the footnote thereto), and will be substantively unfair. As for procedural unfairness, the Tribunal refers in its conclusions on justification to the failures in respect of redeployment, consultation and the implementation of the tailored adjustment plan. I see no reason why, in the circumstances of this case, the difference between the tests for discrimination arising from disability and unfair dismissal should give rise to different conclusions. There is no error of law.

74. Before leaving this section, I should state that neither this judgment nor that of Underhill LJ in **O'Brien** should be seen by Tribunals as licence always to truncate their analysis of a claim of unfair dismissal where a s.15 claim has already been addressed. Whether or not such an approach is appropriate will depend on the facts of the case, the factors relevant to the proportionality analysis, and the extent to which those factors overlap with those relevant to the unfair dismissal analysis. The better approach, possibly in the majority of cases, would be to set out the analysis of the claim under each head more fully.

Ground 4 – Did the Tribunal fail to give adequate reasons for the Polkey reduction?

75. Dr Morgan's submissions went beyond **Meek**-compliance. He also submitted that the Tribunal reached two seemingly irreconcilable conclusions in that the dismissal was discriminatory by reason of failing to apply the extended trigger, whilst at the same time finding that there was a 50% chance that the Claimant would have been dismissed within 4 months in any event. (There is no challenge to the assessment of a 50% chance of dismissal. Dr Morgan's

skeleton argument for the Remedy Appeal notes that the Tribunal "*properly concluded*" there was a 50% prospect of a fair dismissal within 4 months). In my judgment, on a proper reading of paragraph 9 with the rest of the Liability Judgment, there is no inconsistency.

76. The Tribunal commences by noting its earlier conclusion that "*the Claimant's sickness absence record put a strain on the Respondent's ability to maintain a proper OT service to service users at Molineux in year 2015 – 2016…*". However, the Tribunal goes on to refer specifically to the single absence lasting 73 days in addition to the other absences in that period. At paragraph 7.4, the Tribunal said this:

> **"7.4 In summary, we conclude that at least most of the absence of disability -related, either directly, or, indirectly because of CFS the Claimant had greater susceptibility to other illnesses or sicknesses, and absences were likely to be longer. The sicknesses were likely to increase her tiredness which was itself a side-effect of the CMS. <u>There is no medical evidence directly linking the Claimant's depression to CFS or the Respondent's treatment of her, nor is there evidence linking the Claimant's increased anxiety and stress, which may itself be linked to the depression, the imposition of the stricter absence targets</u>…" (Emphasis added)**

77. The Tribunal draws a distinction between those absences related to her underlying conditions and those that were not. The depression was not so related (albeit that it was itself a disability). It was on that basis that the Tribunal went on in paragraph 8 to conclude:

> **"There is the distinct probability that the Claimant could have been justifiably and fairly dismissed; and certainly the SAMP stages would have been triggered at stage 1, even if the adjustment [had] been in place".**

78. The reference to "*the adjustment*" in that passage must logically be a reference to the extended trigger. The Tribunal's conclusion as to the likelihood of dismissal was therefore rooted in absences which were not related to her chronic underlying conditions and which would have arisen irrespective of the reasonable adjustment in question. As such, it was, in my judgment, perfectly open to the Tribunal to consider that there was a realistic prospect of

dismissal even absent discrimination. I do not see that the two conclusions are inconsistent and the Tribunal's reasoning in this regard is more than adequate.

Conclusion on Liability Appeal

79. For all of those reasons, each of the grounds of appeal fails and the Liability Appeal is dismissed.

B. Remedy Appeal

80. The single permitted ground of appeal against the Remedy Judgment is that the Tribunal erred in its analysis of causation in relation to future loss of earnings. In particular, it is now said that there is an inconsistency between the conclusion that the Claimant would have been well enough to return to work after 12 months and the eventual award of 2 years and 9 months' future loss. I should note that this specific focus of the Remedy Appeal only emerged during oral submissions; neither the skeleton argument (at paragraphs 20 to 27), nor the permitted Grounds of Appeal (at paragraphs B(i)-(iii)) make any mention of this alleged inconsistency. The points actually set out in the permitted Grounds of Appeal were not developed in submissions to any significant extent. I can deal with them briefly:

a. Ground B(i) – **Meek**-compliance. There is no substance to this contention, which appears to be based on a factual inaccuracy in any event. The Tribunal's reasons for each head of remedy were fully explained by reference to its factual findings and were based on correct legal principles. It is unarguable that the Remedy Judgment is not **Meek**-compliant. This ground appears to be predicated on an assertion that the

Claimant was "*unfit for work and had been so long before the effective date of termination*". As Mr Bakhsh points out, there is no such finding in the Liability Judgment. On the contrary, the latest OH report dated 20 April 2017 (produced just weeks before her dismissal) stated that "*Tess is fit to undertake her current role*";

b. Ground B(ii) – This merely states that "*The Tribunal was reminded of the obligation to distinguish between the causes of the [Claimant's] medical conditions; chief among them being the act of dismissal*". Two points arise out of that statement: first, it fails to identify any arguable error of law; and second, it is, once again, incorrect in that there is nothing in the Liability Judgment or indeed the Remedy Judgment to the effect that the Claimant's medical conditions were caused by her dismissal. Her depression and her ME/CFS both long preceded her dismissal. The Tribunal did find that those conditions were aggravated by the dismissal, but there is no permitted ground of appeal specifically against that conclusion;

c. Ground B(iii) – This merely alleges that there was a failure to engage with the Respondent's submissions on two points. There is no mention of the inconsistency now relied upon. Furthermore, this ground does not in fact identify any arguable error of law.

81. As for the point that is pursued, I consider that it too is without merit. The Tribunal's finding in respect of her recovery, based on unchallenged medical evidence, was that:

> **"The Claimant's health will substantially improve within the next 12 months and that she will by then <u>be fit to return to some form of work</u> but will never be full-time work although it could well be work for a similar number of hours per week as she was working for the Respondent at the time of the dismissal." (Emphasis added).**

82. As the underlined passage indicates, this was a finding that the Claimant would be fit to return to "*some form of work*", i.e. that she will at that stage be capable of working; however, it is not a finding that she would at that stage be fit to undertake work at the level she was undertaking prior to her dismissal.

83. The Tribunal then (at paragraph 10 of the Remedy Judgment) considers the various challenges that the Claimant is likely to face in returning to her chosen career of occupational therapy. These are numerous, and include the limited range of employers, the travel distances involved and the limitations on her capacity to work full-time. As the Tribunal notes, "*There are likely to be fewer jobs available for part time occupational therapists; and we cannot ignore the fact that she is likely to require other adjustments and significant periods of time off work if she has relapses which will not make her an attractive prospect to a prospective employer.*". All of these factors are likely to prolong the search for employment to a substantial extent. The Tribunal then identifies the question which it has to answer:

> **"The essential issue is when ought the Claimant reasonably to be able to obtain employment at a rate of pay equivalent to £11,732 per annum [that being 50% of her pay at the time of dismissal]."**

84. Dr Morgan submits that that is the wrong test because, as I understand it, the Tribunal has failed correctly to identify the points of reference for the appropriate multiplier. I do not accept that submission. The task for the Tribunal was to assess loss caused by the tort of disability discrimination. The measure of such loss is to put the Claimant in the position that she would have been in had she not been discriminated against. As the dismissal itself was found to be an act of discrimination, one can infer that had she not been discriminated against she would not have lost her job in May 2017. She would, in other words, have continued to earn her salary. Of course, we know that the Tribunal also found that, absent discrimination, there was a 50% chance that she would have been dismissed anyway. That 50% chance that she

would have been dismissed is accounted for by applying a 50% rate to her continued loss of salary. It is then a matter of judgment for the Tribunal to assess the point in the future at which it is likely that loss would reduce or cease. As for the prospects of earning anything in the short term, the Tribunal considered it "*highly unlikely that she would be able to earn anything like the same amount she was earning latterly with the Respondent or even at 50% continuing loss rate of £11,732*".

85. The Tribunal then dealt with the Claimant's claim that she should be entitled to compensation for whole career loss. The Tribunal rejected that contention and gave various reasons as to why that should be the case. The Tribunal then fixes upon the period of a further 2 years' loss of earnings as being just and equitable in all the circumstances. Dr Morgan takes issue with the fact that the factors militating against whole career loss were not also treated as factors militating against losses for the two-year period. However, it seems to me that the kind of factors to which the Tribunal referred were those that would have an effect some considerably greater distance into the future than the shorter period reflected in the award of 2 years.

86. I was referred to the case of **Olayemi v Athena Medical Centre** [2016] ICR 1074, in which HHJ Richardson stated that "…*the employment tribunal should always take account of any existing vulnerability or any divisible cause when it awards compensation*". Dr Morgan submits that the Tribunal in the present case failed to take account of divisibility and that there was, overall, a lack of clarity in the Tribunal's reasoning as to causation. I do not accept that submission. It is not clear what divisibility the Respondent contends ought to have been taken into account; it did not adduce its own medical evidence to challenge the Claimant's evidence as to the causes of her state of health. For the reasons set out in the preceding paragraph, I

consider that the Tribunal's analysis as to causation was tolerably clear and did not disclose any internal inconsistency such as to vitiate the award.

Conclusion on Remedy Appeal.

87. For these reasons, the Remedy Appeal fails and is also dismissed.